



The Role of Title IX Coordinators and Investigators

Presented by

Nina Gupta & Lexi Trumble

Nelson Mullins



Foundational Considerations—General Overview

- Assess the Report
- Intake—Initial Meeting
- Offer Supportive Measures to Complainant
 - And/or to Reporter, if different than Complainant
- Provide Notice and Offer Supportive Measures to Respondent
- Decision Tree
 - Report? Complaint?
 - Formal Complaint under Title IX Regulations? (Threshold determination)
- Investigation
- Adjudication
- Appeal

- These processes involve human beings
 - Emotions
 - Consequences/Implications
 - Accessibility



§ 106.44(a) – General Response to Sexual Harassment

A recipient with **actual knowledge of sexual harassment** in an education program or activity of the recipient against a person in the United States must respond **promptly** in a manner that is **not deliberately indifferent**.



§ 106.44(a) – General Response to Sexual Harassment: *Narrowed Title IX Jurisdiction*

- Alleged Sexual Harassment must involve conduct that occurred “**under an education program or activity** receiving federal funds.” (U.S. Code Title 20 Chap. 38 § 1681).
- Sexual Harassment must have been perpetrated against a person “**in the United States.**”

34 C.F.R. 106.44(a)



§ 106.44(a) – General Response to Sexual Harassment: *Sexual Harassment*

3 categories of misconduct that meet the regulatory definition of “sexual harassment”

- 1) “**An employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in **unwelcome** sexual conduct;” [*quid pro quo*]
- 2) “**Sexual assault**” as defined in 20 U.S.C. § 1092(f)(6)(A)(v), “**dating violence**” as defined in 34 U.S.C. § 12291(a)(10), “**domestic violence**” as defined in 34 U.S.C. § 12291(a)(8), or “**stalking**” as defined in 34 U.S.C. § 12291(a)(30); or
- 3) “Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient’s education program or activity.”

34 C.F.R. 106.30(a).



§ 106.30(a) – Definitions

“Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to a recipient’s **Title IX Coordinator** or **any official of the recipient who has authority to institute corrective measures on behalf of the recipient”**

- “Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.”
- “This standard is not met when the only official of the recipient with actual knowledge is also the respondent.”
- “The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.”

34 C.F.R 106.30(a).



§ 106.30(a) – Definitions

“Complainant means an individual who is alleged to be the victim of conduct that **could** constitute sexual harassment.”

“Respondent means an individual who has been reported to be the perpetrator of conduct that **could** constitute sexual harassment.”



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

The Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate informal resolution process may not have a conflict of interest or bias—either for or against complainants, respondents, or individual parties.

34 C.F.R. 106.45(b)(1)(iii).

Formal Complaints

- “Formal complaint means a **document filed by a complainant or signed by the Title IX Coordinator** alleging **sexual harassment** against a respondent and requesting that the recipient investigate the allegation of sexual harassment.”
 - “At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”
 - “A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.”

34 C.F.R. 106.30(a).



Title IX Coordinators



TIX Coordinator's Purpose, Authority & Responsibilities

Responsibilities

1. Know the BOR Uniform Policy, Title IX Grievance process, and related Institutional policies.
2. Know and oversee the procedures used to investigate and resolve Title IX reports and complaints.
3. Coordinate the implementation and administration of Title IX grievance procedures, which includes:
 - Educating the campus community on how to file a complaint;
 - Investigations;
 - Working with law enforcement when necessary; and
 - Ensuring prompt and appropriate responses to complaints, including fair and equitable grievance procedures.



TIX Coordinator's Purpose, Authority & Responsibilities

4. Evaluate requests for confidentiality.
5. Monitor outcomes of complaints involving power-based violence.
6. Assess affects of power-based violence on the campus climate.
7. Provide or facilitate regular training, consultation and technical assistance to students, faculty and staff on school policies related to sex discrimination.
8. Develop programs, such as assemblies or trainings, on issues related to Title IX to assist the school in making sure that all members of the campus community, including students and staff, are aware of their rights and obligations under Title IX.



TIX Coordinator's Purpose, Authority & Responsibilities

Responsibilities (continued)

9. Promptly take steps (i.e. supportive measures) to ensure a complainant's equal access to the school's programs and activities and protect the complainant as necessary upon learning of a report or complaint of power-based violence.
10. Determine whether campus-wide remedies should be adopted in response to a report or complaint of power-based violence, including increased monitoring, supervision or security at locations where power-based violence is reported to occur, and increased education and prevention efforts, including to targeted populations.



§ 106.45(b) – Grievance Process: *Notice of Allegations*

- Upon receipt of a formal complaint, a recipient must provide known parties with written notice of various matters, including:
 - the formal complaint’s allegations;
 - the formal grievance procedures; and
 - any code-of-conduct provision that prohibits knowingly making false statements or submitting false information during the grievance process.

34 C.F.R. 106.45(b)(2).



§ 106.45(b) – Grievance Process: *Notice of Allegations*

- Sufficient details include:
 - Identities of the parties involved in the incident, if known;
 - Conduct allegedly constituting sexual harassment under 106.30;
 - The date and location of the alleged incident, if known.
- Notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney.

34 C.F.R. 106.45(b)(2).



§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures*

“A recipient’s response must treat complainants and respondents equitably by offering supportive measures . . . to a complainant. . . .”

“Supportive measures means **non-disciplinary, non-punitive individualized services** offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”

“Such measures are designed to restore or preserve equal access to the recipient’s education program or activity, without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”

34 C.F.R. 106.30(a).

§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures (cont.)*

“Supportive measures may include:”

- “counseling,
- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- campus escort services,
- mutual restrictions on contact between the parties,
- changes in work or housing locations,
- leaves of absence,
- increased security and monitoring of certain areas of the campus; and
- other similar measures.”

34 C.F.R. 106.30(a).



§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures* (cont.)

- Title IX Coordinator must promptly contact complainant to:
 - discuss the availability of supportive measures,
 - consider the complainant’s wishes with respect to supportive measures,
 - inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
 - explain to the complainant the process for filing a formal complaint.



§ 106.44(b) – Recipient’s Response to Sexual Harassment: *Response to Formal Complaint*

“In response to a **formal complaint**, a recipient **must** follow a **grievance process that complies with § 106.45**. With or without a formal complaint, a recipient must comply with § 106.44(a).”



§ 106.45(b) – Grievance Process:
Determination of Responsibility (cont.)

“The Title IX Coordinator is responsible for effective implementation of any remedies.”

34 C.F.R. 106.45(b)(7)(iv).



Investigators



Title IX Investigations

PURPOSE

❖ To determine whether or not the alleged conduct occurred.

❖ If the conduct occurred, to determine what actions the school will take to end the sexual violence, eliminate the hostile environment and prevent its recurrence.

❖ To foster confidence in the school's vision and policies.

❖ To bolster the concept of fair treatment.

❖ To minimize the school's risk of potential exposure to legal claims.

❖ To greatly increase the school's ability to successfully defend against Title IX-related claims that may arise.

Title IX Investigations

- An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.

Examples of some possible considerations:

- Nature of the allegation;
- Age of the student or students involved;
- Size and administrative structure of the school;
- State or local legal requirements (including mandatory reporting requirements for schools working with minors); and
- Lessons from past experiences.



Title IX Investigations vs. Criminal Investigations





Title IX Investigations vs. Criminal Investigations

Title IX Investigation	Criminal Investigation
<ul style="list-style-type: none">• Mandatory.• Intended to determine whether an individual violated Title IX.• Will never result in incarceration of an individual.• Termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.• "Preponderance of the evidence" or "clear and convincing evidence"	<ul style="list-style-type: none">• Discretionary.• Intended to determine whether an individual violated criminal law.• Might subject an individual to incarceration or criminal penalties.• Invokes certain constitutional protections, such as the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation.• "Beyond a reasonable doubt"



The Investigator

PURPOSE

To uncover facts related to allegations of sexual misconduct by gathering documents and other materials, interviewing parties and witnesses, and working with third parties (such as law enforcement), when necessary.

The Investigator

- Experienced.
- Trained.
- Impartial.
- Professional.
- Good Judgment.
- Ability to Competently Testify In Court Proceedings, If Needed.
- Neutral.
- Searches for Facts, Not Opinions or Beliefs.
- Builds Rapport With the Interviewees.
- Prepared to Professionally Handle Uncooperative Persons or Interviewees.

The Investigation

- Conducted by an Investigator.
- May include:
 - Conducting substantive interviews of the Complainant, the Respondent, and any witnesses.
 - Reviewing law enforcement investigation documents, if applicable.
 - Reviewing relevant student files;
 - Gathering and examining other relevant documents, texts, emails or other evidence.

Investigation Practices

- Neither the Investigator nor the Title IX Coordinator makes recommendations or credibility determinations.
- The Investigator does not filter information that may be necessary to the decision-maker(s)' eventual review but, instead, gathers facts and presents them for consideration.
- The decision-maker(s) decide:
 - disputes of facts;
 - weight of evidence; and
 - relevance.



§ 106.45(b) – Grievance Process: *Investigation of a Formal Complaint*

- **Burden to investigate on Institution** – Must “[e]nsure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties,” with the exception of a party’s medical records.
- **Opportunity to suggest evidence** – Must “[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.”
- **No gag order** – May not restrict the parties ability to discuss the case and gather evidence.

34 C.F.R. 106.45(b)(5)(i)-(iii).



Trauma-Informed Practices



Using Trauma-Informed Techniques to Evaluate Evidence

- At the beginning, say something like “I’m going to ask a lot of questions to clarify”
- If possible, allow the party to give an uninterrupted narrative. Later, go back and ask questions
- Avoid “why” questions
- Asking about sensory information may lead to the details you need: “when ___ happened, what did you see?” “If you did, how did you communicate that you didn’t want to do that?” “are there any images, sounds, or smells that keep coming back to you?”
- Listen for course of conduct, power and control



Using Trauma-Informed Techniques to Evaluate Evidence





Gathering Facts About Consent

- **Consent:** Consent to engage in sexual activity must exist from beginning to end of each instance of sexual activity.
 - Consent is demonstrated through **mutually understandable words and/or actions** that clearly indicate a willingness to engage in a specific sexual activity.
 - **Silence alone, without actions evidencing permission, does not demonstrate Consent.** Consent must be **knowing and voluntary**.
 - To give Consent, a person must be of legal age.
 - Assent does not constitute Consent if obtained through coercion or from an individual whom the Alleged Offender knows or reasonably should know is **Incapacitated**.
 - The responsibility of obtaining Consent rests with the person initiating sexual activity.
 - Use of alcohol or drugs does not diminish one's responsibility to obtain Consent.
 - **Consent to engage in sexual activity may be withdrawn by any person at any time.**
 - Once withdrawal of Consent has been expressed, the sexual activity must cease. Consent is automatically withdrawn by a person who is no longer capable of giving Consent.
 - A current or previous consensual dating or sexual relationship between the parties does not itself imply Consent or preclude a finding of responsibility.

Gathering Facts About Consent

- ▶ **Incapacitation:** An individual is considered to be incapacitated if, by reason of mental or physical condition, the individual is **manifestly unable to make a knowing and deliberate choice to engage in sexual activity.**
 - ▶ Individuals who are asleep, unresponsive, or unconscious are incapacitated. Other indicators that an individual may be incapacitated include, but are not limited to, inability to communicate coherently, inability to dress/undress without assistance, inability to walk without assistance, slurred speech, loss of coordination, vomiting, or inability to perform other physical or cognitive tasks without assistance.

Incapacitation

- Manifestly unable to make a knowing and deliberate choice to engage in sexual activity.
- Can result from mental disability, sleep, involuntary physical restraint, or from intentional or unintentional taking of alcohol and/or other drugs.
- Whether someone is incapacitated is typically judged from the perspective of an objectively reasonable person.



Investigating and Fact-Finding





§ 106.45(b) – Grievance Process: *Investigation of a Formal Complaint (cont.)*

- **Opportunity to review pre-report evidence** – Must “[p]rovide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint. . . .”
 - Before completion of investigative report, must send the evidence to the parties and their advisors and give them 10 days to submit a written response.
 - Investigator must consider the written response before completing the final report.



Investigative Report

- Purpose: To summarize and analyze the relevant facts determined through the investigation, with reference to any supporting documentation or statements. Parties should be given the opportunity to review one another's statements and may also be provided with a written summary of other information collected during the investigation.
- Parties may submit comments within five (5) calendar days after the statement or summary was provided. Following the receipt of any comments submitted, or after the five-day comment period has lapsed without comment, the Investigators should address any identified factual inaccuracies or misunderstandings, as appropriate.
- The final Investigative Report should provide a summary of the Investigators' impressions, including context for the evidence collected, but **should not make a final determination as to whether a violation of the Power-Based Violence Policy occurred**, reserving that decision (and any sanctions) for the appropriate decision maker(s).



Informal Resolution

A recipient may facilitate an informal resolution process, such as mediation, in lieu of a formal grievance process.

Before doing so, however, the recipient must provide written notice to the parties of their rights, including the right to withdraw from the process at any time, and it must obtain both “parties’ voluntary, written consent” to informal measures.

Informal resolution processes are not allowed for formal complaints involved employee-respondents.

34 C.F.R. 106.45(b)(9).

- “An Informal Resolution should involve a remedies-based, non-judicial process designed to eliminate or address potential power-based violence.”
 - Aims: to assure fairness, to facilitate communication, and to maintain an equitable balance of power between the parties.
 - Institutions should not compel face-to-face confrontation between the parties or participation in any particular form of Informal Resolution.

BOR Uniform Policy X(H)

Continuing Responsibility Throughout and After the Adjudicative Process



§ 106.71 – Retaliation

- **Prohibited retaliation:**

- “No recipient **or other person** may **intimidate, threaten, coerce or discriminate** against any individual **for the purpose of interfering with any right or privilege** secured by [Title IX or its regulations], or because the individual has made a **report or complaint, testified, assisted, or participated or refused to participate** in any manner in an investigation, proceeding, or hearing under this part.”
- “Intimidation, threats, coercion, or discrimination, **including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances** as a report or complaint of sex discrimination, or a **report or formal complaint of sexual harassment**, for the purpose of interfering with any right or privilege secured by [Title IX or its regulations], constitutes retaliation.”

34 C.F.R. 106.71(a).

§ 106.71 – Retaliation (cont.)

- **Exceptions:**

- **First Amendment** – “The exercise of rights protected under the First Amendment does not constitute retaliation....”
- **Materially False Statements** – “Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding . . . does not constitute retaliation . . . , provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.”

34 C.F.R. 106.71(b).



Retaliation—BOR Uniform Policy

- Retaliation is expressly prohibited under this Policy. Retaliation includes, but is not limited to, intimidation, harassment, threats, or other adverse action or speech against the person who reported the misconduct, the parties, and their witnesses.
- The BOR, system management boards, and Louisiana’s postsecondary Institutions expressly prohibit retaliation against anyone who:
 - In good faith reports what they believe is power-based violence,
 - Cooperates with an investigation or proceeding under this Policy, or
 - Opposes conduct that they believe to violate this Policy.
- Anyone who knowingly makes a false accusation of unlawful discrimination, harassment, or retaliation of any form will be subject to an investigation for a potential violation of this Policy and may be subject to disciplinary action, up to and potentially including termination for employees and expulsion for students.

BOR Uniform Policy VI



Retaliation—BOR Uniform Policy

- However, an individual who reports an incident of power-based violence or participates in an investigation or proceeding and has perpetrated or assisted in the perpetration of committing the power-based violence reported, is still subjected to an investigation for a potential violation of this policy and may be subject to disciplinary action.

BOR Uniform Policy VI

§ 106.45(b) – Grievance Process: *Appeals (cont.)*

- **Mandatory grounds for appeal:**

- “Procedural irregularity that affected the outcome of the matter;”
 - “New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and”
 - **The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.”**
- “A recipient may offer an appeal equally to both parties on additional bases.”

34 C.F.R. 106.45(b)(8)(i)-(ii).



Contact Information



Neeru “Nina” Gupta

Partner

(404) 322-6109

Atlanta, GA

nina.gupta@nelsonmullins.com



Lexi Trumble

Associate

(404) 322-6527

Atlanta, GA

alexis.trumble@nelsonmullins.com